IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 395

UNITED STATES OF AMERICA,

Petitioner,

—v.—

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX TO APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

Civil Action No. 1647

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1964	
Sept. 8	Filing Original Complaints. J. S. 5 card prepared.
Sept. 8	Preparing copy and Issuing Summons for service. Delivered to U.S. Marshal.
Sept. 17	Filing Marshal's Return of Service.
Oct. 2	Filing Defendant's Motion for More Definite Statement.
Oct. 2	Filing Defendant's Motion to Dismiss.
Oct. 2	Filing Defendant's Answer.
Dec. 31	Filing Plaintiff's Request for Admissions with Certificate of Service attached thereto.
1965	
Feb. 4	Filing Plaintiff's Brief in Response to Defendant's Motions to Dismiss and for More Definite Statement with certificate of Service attached thereto.
Sept. 8	Filing Response to Brief filed by Defendant at hearing held July 15, 1965.
Oct. 12	Filing and entering Order granting defendant's Motion to Dismiss Complaint. (Mr. W. Reeves Lewis, Asst. U.S. Attorney, notified by mail of this Order this date) J. S. 6 card prepared.

DATE	FILINGS—PROCEEDINGS
1965	
Nov. 3	Filing Judgment on Decision by the Court dismissing case in accordance with Order of Court filed October 12, 1965. Copy of Judgment served on U.S. Attorney by hand this date.
Dec. 10	Filing Plaintiff's Notice of Appeal with certificate of service thereon.
1966	
Jan. 17	Filing Order of Court enlarging time for docketing record in Court of Appeals to Feb. 18, 1966.
Feb. 10	Filing Plaintiff-Appellant's Designation of Record on Appeal with certificate of service.
No. 23432—In the United States Court of Appeals for the Fifth Circuit	
1969	
Feb. 28	Opinion of the Court of Appeals
Feb. 28	Judgment of the Court of Appeals
No. 395 —In the United States Supreme Court	
1969	
May 27	Order extending time to file petition for a writ of certiorari until July 28, 1969.
July 28	Petition filed.
Aug. 18	Brief in opposition filed.
Oct. 13	Order of Supreme Court granting certiorari.

COMPLAINT

(Filed September 8, 1964)

Plaintiff, The United States of America, complains of M. O. Seckinger, Jr., Trading as M. O. Seckinger Company, defendant herein and alleges:

Count I

1. That the defendant is the owner of a construction company maintaining a business address at 412 Whitaker Street, Savannah, Chatham County, Georgia, within the Southern District of Georgia.

2. That on the 11th day of August 1958, one Ernest E. Branham instituted an action in the United States District Court for the Eastern District of South Carolina, Columbia Division, Civil Action Number AC-183 entitled *Ernest E. Branham* v. *United States.*

3. That said action was instituted pursuant to the Federal Tort Claims Act, 28 U.S.C. Section 1346 (b), to recover damages suffered by said Ernest E. Branham when he was injured on or about November 14, 1956, while working as a steam fitter for the M. O. Seckinger Company in the construction of outside distribution steam supply lines at the Paris Island Marine Depot, South Carolina.

4. That said complaint further alleged that on or about the date of November 14, 1956, while the said Ernest E. Branham was engaged in his work as an employee for the named defendant herein he was caused to come in contact with electric wires of high voltage which caused him to sustain severe injuries for which he sought damages in the amount of $125,000.00.

5. That on the 25th day of January, 1960, the United States of America moved to implead the M. O. Seckinger Company as a third-party defendant in the suit brought by the said Ernest E. Branham against the United States and on July 20, 1960, an order was issued by the United States District Court granting said motion to implead the M. O. Seckinger Company.

6. That on the 17th day of July, 1961, upon motion made by the attorney for M. O. Seckinger Company to dismiss the third-party complaint the United States District Court did dismiss the third-party complaint and issued an order which stated:

> After hearing the arguments of counsel, I am of the opinion that the controversy between The United States of America, Third-Party Plaintiff, and M. O. Seckinger Company, Third-Party Defendant, should not be resolved at this time and further that its inclusion in the trial of the dispute between Ernest E. Branham and the United States of America would unnecessarily and improperly complicate the issues between the Plaintiff and the United States of America. For this reason I, therefore, order that the Third-Party Complaint be dismissed with leave to the Defendant, The United States of America, to take such further action at an appropriate time against M. O. Seckinger Company as it may be advised.

7. That after trial of the civil suit instituted by said Ernest E. Branham judgment was rendered against the United States of America in the amount of $45,000.00 and that thereafter costs were assessed against the United States in the amount of $66.20 and that the United States of America paid to Ernest E. Branham by checks from the Treasury of the United States, dated November 15, 1961, $45,066.20.

8. That at all pertinent times the defendant was an independent contractor engaged pursuant to Contract NOy-91119, dated 28 April 1956, by the United States of America to construct outside distribution steam supply lines at the Paris Island Marine Depot and that under the terms of said contract the defendant, M. O. Seckinger, Jr., Trading as M. O. Seckinger Company, undertook and agreed, among other things, to be "responsible for all damages to persons or property that occurred as a result of his fault or negligence in connection with the prosecution of the work."

9. That all injuries and disabilities sustained by Ernest E. Branham were caused by and must solely be the

responsibility of the defendant herein in that at said time and at said place the defendant, by and through its agents, servants and employees:

(a) Failed to request that the power distribution line be deenergized.

(b) Failed to request that the wires at the place where the accident occurred should be insulated.

(c) Failed to provide safety insulation on the wires.

(d) Permitted and in fact directed Ernest E. Branham to work in an area where live wires were in close proximity to his place of work.

(e) Failed to prevent Ernest E. Branham from proceeding in a manner that was dangerous and which caused him to be injured.

10. That Ernest E. Branham made a recovery as against the United States of America because of the fault or negligence of the defendant, its agents, servants and employees as set forth above and therefore the United States of America is entitled to be fully indemnified as to all such sums from the defendant herein.

Count II

11. The plaintiff incorporates by reference the allegations contained in paragraphs 1 through 9 as fully as though the same were here set forth at length.

12. That having undertaken to perform the contract with the United States of America the defendant, its agents, servants and employees were obligated to perform the work properly and safely and to provide workmanlike service in the performance of said work.

13. That the United States of America became obligated and did pay to said Ernest E. Branham $45,066.20 which was a result of the breach of contract by the defendant, its agents, servants and employees as set forth above and that therefore the United States of America is entitled to recover fully all such sums from the defendant herein.

WHEREFORE, plaintiff demands judgment against defendant as follows:

(a) For the sum of Forty-five thousand sixty-six dollars and twenty cents ($45,066.20) and
(b) For its costs of suit herein incurred;
(c) For interest allowable under the law.

DONALD H. FRASER
United States Attorney

/s/ W. REEVES LEWIS
Assistant U. S. Attorney

Address:

Post Office Box 979
Savannah, Georgia

MOTION TO DISMISS

(Filed October 2, 1964)

NOW COMES the defendant in the above captioned matter and moves the Court to dismiss both counts of this action because the complaint fails to state a claim against defendant on which relief can be granted due to the following reasons:

(a) The contract sued on was not a contract of indemnity so as to make this defendant liable.

(b) The cause of action which plaintiff sues on has already been satisfied by payment of $45,066.00 to Ernest E. Branham.

(c) Any liability for any injury to or damage to Ernest E. Branham was covered by the Workmen's Compensation laws of the State of Georgia and the State of South Carolina, and this defendant is not further liable thereon.

(d) This claim is barred by the Statute of Limitations of the State of Georgia.

(e) This claim is barred because there can be no contribution within this State between joint tort feasors.

(f) This claim is barred because of the failure of the United States Government to successfully interplead this defendant in action Number AC-183 in the District Court of the United States, Eastern District of South Carolina, Columbia Division, and judgment therein is res adjudicata.

(g) The contract sued on did not specifically indemnify United States of America for injury caused by its own negligence.

KENNEDY AND SOGNIER

By /s/ J. G. KENNEDY, JR.
Attorneys for Defendant
717 Realty Building
Savannah, Georgia

ANSWER

(Filed October 2, 1964)

NOW COMES M. O. SECKINGER, JR., T/A M. O. SECKINGER COMPANY, the defendant, in the above captioned matter, and subject to his Motion to Dismiss heretofore filed, and his Motion for More Definite Statement heretofore filed, answers plaintiff's petition, and says:

1. Defendant denies paragraph 1 in Count I of plaintiff's petition.
2. Defendant denies paragraph 2 in Count I of plaintiff's petition.
3. Defendant denies paragraph 3 in Count I of plaintiff's petition.
4. Defendant denies paragraph 4 in Count I of plaintiff's petition.
5. Defendant denies paragraph 5 in Count I of plaintiff's petition.
6. Defendant denies paragraph 6 in Count I of plaintiff's petition.
7. Defendant denies paragraph 7 in Count I of plaintiff's petition.
8. Defendant denies paragraph 8 in Count I of plaintiff's petition.
9. Defendant denies paragraph 9 in Count I and each and every sub-paragraph thereof of plaintiff's petition.
10. Defendant denies paragraph 10 in Count I of plaintiff's petition.
11. Defendant denies paragraph 11 in Count II of plaintiff's petition.
12. Defendant denies paragraph 12 in Count II of plaintiff's petition.
13. Defendant denies paragraph 13 in Count II of plaintiff's petition.

WHEREFORE, defendant prays that claim of plaintiff be denied.

KENNEDY AND SOGNIER

By /s/ HORACE L. CHEEK, JR.
Attorneys for Defendant

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil No. 1647

(caption omitted)

ORDER OF COURT

(Filed October 12, 1965)

Defendant having filed a Motion to Dismiss plaintiff's claim of indemnity on several grounds, the indemnification clause of the contract must be reviewed.

> "He (defendant) shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." (Page 3—Contract between plaintiff and defendant). (Parenthesis added).

Previously, the plaintiff had been adjudged negligent under a similar set of facts by the United States District Court, Eastern District, South Carolina. (AC-183). Under Order of that court it has paid to one Branham the sum of Forty-five Thousand ($45,000.00) Dollars because of its negligence on the job which plaintiff worked as a subcontractor.

The plaintiff now seeks recovery of this amount from the defendant based on the indemnification as aforestated.

It seems that plaintiff cannot succeed for several reasons.

First, in AC-183 the government attempted to involve the defendant by impleading him as a third party defendant. The court entered an Order stating that the controversy between the United States and Seckinger should

not be resolved at that time and dismissed the plaintiff's third party complaint.

The plaintiff having thus failed to implead the defendant is now seeking to do the same thing. It does not seem that they have this right. Certainly, an appeal should have been filed on the previous Order of Judge Timmerman if the plaintiff intended to prosecute their claim against Seckinger.

Moreover, the court finds that the language of the contract as alleged is not broad enough either expressly or impliedly to indemnify the government from its own negligence. Certainly, this court is bound by the fact that the government was negligent and adjudged so. As a result, the instant claim seeks indemnification from the plaintiff's own negligence. Plaintiff was in an ideal position to write more into its contract if it actually intended indemnification from its own negligence. Such a broad save harmless agreement is commonplace but none appears in the contract under consideration.

Other arguments are advanced by defendant. He strenuously maintains that he has paid his obligation for any injury to Branham, his employee, by way of compliance with the Workmens Compensation law. He also maintains there can be no contribution between joint tort feasors. He also maintains that plaintiff is attempting to go behind the South Carolina judgment in order to maintain its position. While these arguments appear meritorious, sufficient grounds to sustain the Motion have already been stated.

For all the foregoing reasons, the Motion to Dismiss of defendant is hereby granted.

This 11 day of October, 1965.

F. M. SCARLETT
Judge
United States District Court
Southern District of Georgia

JUDGMENT ON DECISION BY THE COURT

(Filed November 3, 1965)

This action came on for (hearing) before the Court Honorable F. M. Scarlett, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged in accordance with Order filed October 12, 1965, that this action be dismissed.

Dated at Savannah, Georgia, this 3rd day of November 3rd [sic], 1965.

EUGENE F. EDWARDS
Clerk
U.S. District Court,
S.D. Georgia

By /s/ LOUIS E. AENCHBACHER
LOUIS E. AENCHBACHER
Chief Dep. Clerk of Court

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 23432

UNITED STATES OF AMERICA, APPELLANT

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY, APPELLEE

Appeal from the United States District Court for the Southern District of Georgia

(February 28, 1969)

Before BROWN, Chief Judge, GOLDBERG and AINSWORTH, Circuit Judges.

BROWN, Circuit Judge: This case began sounding in tort but through a simple twistification, *General Guaranty Ins. Co.* v. *Parkerson*, 5 Cir., 1966, 369 F.2d 821, of the Federal impleader rule, F.R.Civ.P. 14(a), plus a prior final judgment, it is now here after several dismissals for failure to state a claim, for a decision on the propriety of the most recent dismissal. We are called upon like many times in the past,[1] to determine if a contract[2] calls for indemnity or is merely a simple responsibility clause. This case would be one of a simple nature except for two factors: first, in a prior suit, the

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[1] American Agricultural Chemical Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856; Jacksonville Terminal Co. v. Railway Express Agency, 5 Cir., 1961, 296 F.2d 256; Travelers Ins. Co. v. Busy Electric Co., 5 Cir., 1961, 294 F.2d 139; Batson-Cook Co. v. Industrial Steel Erectors, Inc., 5 Cir., 1958, 257 F.2d 410.

[2] *The contract in this case provides:*

"He [Seckinger] shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work."

indemnitee has been found negligent, and we must decide if this bars his recovery, and second, another wrinkle, *Mike Hooks* v. *Pena*, 5 Cir., 1963, 313 F.2d 696, 1963 A.M.C. 355, is that the United States is a primary party to the contract. We are not here dealing with merely a contract entered into between two private parties. Rather we are confronted with a contract having direct and significant public interest. Cf. *J. M. Huber Corp.* v. *Denman*, 5 Cir., 1966, 367 F.2d 104.

The facts can be severally capsulated.[3] In 1956, Claimant, an employee of Contractor, was injured when he came into contact with a high voltage wire while working on a pipe job that Contractor was performing at the Paris Island Marine Depot, South Carolina. Claimant filed an FTCA suit, 28 U.S.C.A. § 1346(b) (1964), against the Government in South Carolina, for negligence in not deenergizing the wire and for not warning the workers of the danger involved. The Government filed a third-party claim[4] against Contractor alleging that Claimant's injuries were caused by Contractor's negligence, and asking for recovery against Contractor for all sums recovered by Claimant from it. Contractor, contending that the Government's third-party claim failed

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[3] Claimant:

Ernest E. Branham, injured employee of Contractor who initiated the suit and recovered a judgment against the Government.

Contractor:

M. O. Seckinger Company, employer of Claimant and the appellee-indemnitor in this appeal.

Government:

United States Government, owner for whom work was being performed by Contractor and now the appellant-indemnitee.

Claimant is not a party to this appeal by the Government.

[4] The Government brought this third-party claim against Contractor pursuant to F.R.Civ.P. 14(a) which provides:

> "*When Defendant May Bring in Third Party.* At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

to state a claim upon which relief could be granted, moved to dismiss. The motion was granted.[5] Thereupon the suit by Claimant against the Government went to trial in the District Court in South Carolina. The Government was found negligent and Claimant awarded $45,000.

Thereafter the Government instituted the present suit against Contractor in the Southern District of Georgia asserting that Contractor's negligence caused Claimant's injuries, and that under the express terms of the contract between the parties (see note 2, *supra*), Contractor was required to indemnify the Government. Contractor's motion to dismiss this complaint was granted. The Court had a double-barrelled basis for its dismissal. The first was that this suit was barred by res judicata since the Government had not appealed from the prior dismissal of its impleader claim. The second was that a mere examination of the contract showed that it is not one which would allow the Government, who had been found negligent in a prior trial, to recover its losses from Contractor. This appeal followed.

The prior dismissal of the Government's claim (see note 5, *supra*) was without prejudice to refiling. We

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[5] In granting the motion on July 17, 1961 the Judge's order stated:

> "After hearing the arguments of counsel, I am of the opinion that the controversy between the [Government] Third-Party Plaintiff, and [Contractor] Third-Party Defendant, should not be resolved at this time and further that its inclusion in the trial of the dispute between [Claimant] and [Government] would unnecessarily and improperly complicate the issues * * *. I therefore order that the * * * complaint of the United States be dismissed with leave * * * to the United States * * * to take such further action at an appropriate time * * *."

Not because we have inherited an appeal which otherwise would have gone to the Fourth Circuit, we think subsequent events prove that nothing was to be gained by truncating the case. Since all claims were for determination by the Judge without a jury under FTCA, the complications, if any, were readily controllable. There are many ways to handle varying issues, burdens of proof, etc., in impleader, cross-claim situations. See United States Lines Co. v. Williams, 5 Cir., 1966, 365 F.2d 332, 336 n. 11, 1966 A.M.C. 2418, 2424 n. 11.

hold that dismissal on the ground of res judicata was erroneous since the Trial Court expressly left it open for the Government to pursue its claim at a later date.

The question at the outset is what law is to govern, State (South Carolina) or Federal? We think the simple answer is that Federal law must control.[6] The first and certainly one of the leading cases in this area is *Clearfield Trust Co.* v. *United States*, 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838. There the Court held that "[t]he application of state law * * * would subject the rights and duties of the United States to exceptional uncertainty" 318 U.S. at 367, 63 S.Ct. at ——, 87 L.Ed. at ——. There is obviously a need for uniformity in results relative to claims presented by the United States to the Federal Courts for solution.[7] As the discussion on the ultimate merits reveals, there is more than enough difficulty in trying to synthesize a rule that could safely be followed by a multi-state corporate business enterprise in determining the construction and enforceability of indemnity contracts without imposing the same uncertainty and burden on the national sovereign in its undertaking to have contractors perform essential work within its wide sphere of governmental responsibilities. Anything having such a direct touch upon the national treasury should likewise be resolved on standards having like national uniformity. But to conclude that it is Federal law, not State (South Carolina) law, that governs, is no solution. It merely states the problem for there is no clearly defined Federal law, which means that with divergent views in the 50 states, we must make the choice.

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[6] 41 Am.Jur.2d *Indemnity* § 5 at 691 (1968).

> "Federal case law is controlling as to the right of the Federal Government to indemnification under an indemnity contract into which it has entered, and such a contract is not repugnant to the Federal Tort Claims Act or contrary to public policy."

[7] *Cf.* Petty v. Tennessee-Missouri Bridge Comm'n, 1959, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804; United States v. Jones, 9 Cir., 1949, 176 F.2d 278. *See* Free v. Bland, 1962, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180; Royal Indemnity Co. v. United States, 1941, 313 U.S. 289, 61 S.Ct. 995, 85 L.Ed. 1361; Security Life & Accident Ins. Co. v. United States, 5 Cir., 1966, 357 F.2d 145.

At the outset the Government seeks to escape from the necessity of any choice and certainly the prospect of our adopting, as a Federal rule, the majority rule. It does this by asserting that its agreement with Contractor is not one for indemnity at all, whether indemnity based upon the Government's negligence as indemnitee or the indemnitor-Contractor's negligence, or a mixture of both. It insists that the engagement is a simple but direct one of putting responsibility on Contractor for all damages to property or persons, although its manner of statement and the absence of the classic terminology of indemnity might well have a bearing upon how it is to be construed and applied. We think this is a much too literal, unrealistic approach. If the Government is right on the construction of it, then in its operative effect it will afford to the Government all of the advantages of an indemnity and will impose on Contractor all of the correlative disadvantages. Thus the stage is set for a determination of the significance negligence on the part of the indemnitee should have. For a while this case suffers from all of the uncertainties of a swift and unilluminating disposition on bare bones pleadings.[8]

The very assertion of the case by the Government inevitably casts it in the role of a negligent actor. The Government's claim against Contractor rests on the fact that it has had to pay substantial sums to Claimant and this was the direct result of a finding of negligence on its part. Its allegation that Contractor was negligent and that this negligence of the Contractor, not that of

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[8] As we recently said in Barber v. M/V Blue Cat, 5 Cir., 1967, 372 F.2d 626, "at this day and time dismissal of a claim—land-based, waterborne, amphibious, equitable, legal, maritime, or an ambiguous, amphibous mixture of them all—on the basis of the barebone pleadings is a precarious one with a high mortality rate." *Id.* at 627. The test for a dismissal without a fact finding, articulated in Conley v. Gibson, 1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46, 78 S.Ct. at 102, 2 L.Ed.2d at ——. This brings us to the asserted facts of the claim and the terms of the contract.

the Government, was the real proximate cause of Claimant's injuries does not save the day. It simply precipitates the problem of whether this contract (see note 2, *supra*) imposes on Contractor the burden of absorbing all of the loss brought about by active negligence of the indemnitee if, in some appreciable way, negligence even though slight, of the indemnitor contributed to the damage.

That question is essentially one of contract construction, but a construction viewed from the standpoint of the parties, their relative freedom of action and real bargaining strength and the principles of construction imposed by the pertinent law (State or Federal) concerning the liberality or strictness with which such agreements are to be read. For we would certainly not consider for a moment in fashioning Federal law, that a contract to indemnify one against the consequences of the indemnitee's own negligence is contrary to public policy and thus void altogether, even though there is some division among the courts.[9]

In approaching this as a question of law, really choice of law, governing Federal contracts and contractual relationships with governmental contractors, we think everything points toward the desirability of seeking not only a uniformity for the national sovereign but doing that in a way which will more or less simultaneously effect a uniformity with local law. The easiest way to achieve that is to declare that the Federal interest will best be served by choosing the majority rule. Of course, to choose the law is not to eliminate uncertainty or difficulty or the possibility of variable results. But it will lay a standard concerning the approach which the re-

[9] Some jurisdictions hold such a contract void ab initio as against public policy. Woodbury v. Post, 19—, 158 Mass. 140, 33 N.E. 86; Sternman v. Metropolitan Life Ins. Co., 19—, 170 N.Y. 13, 62 N.E. 763. Other courts hold that such contracts are not void, cf. National Surety Corp. v. Rauscher, Pierce Co., 5 Cir., 1966, 359 F.2d 572, 577.41 Am.Jur.2d *Indemnity* § 9, at 694 (1968): "[I]t is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence provided the indemnity against such negligence is made unequivocally clear in the contract."

viewing court is to have and those principles which the court may properly regard to be the performance of acceptable judicial functions and prerogatives.

The majority rule has been variously stated. 41 Am. Jur. 2d § 15, at 701 (1968): "[A]n overwhelming majority of jurisdictions adhere to the general rule requiring an unequivocal expression of intent before allowing indemnity for the indemnitee's own negligence * * *."

Although this court in *Jacksonville Terminal*[10] rejected

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[10] Jacksonville Terminal Co. v. Railway Express Agency, Inc., 5 Cir., 1962, 296 F.2d 256, *cert. denied*, 369 U.S. 860, 82 S.Ct. 949, 8 L.Ed.2d 18. However, *Jacksonville* which spoke for Florida only now apparently is but an historical marker for it now joins the many other cases where the highest state courts within the Fifth Circuit have declined to follow our *Erie* judgments. W.S. Ranch Co. v. Kaiser Steel Corp., 10 Cir., 1967, 388 F.2d 257, 264-65 n. 11-14, *reversed*, 1968, —— U.S. ——, 88 S.Ct. ——, 20 L.Ed.2d 835.

In Gulf Oil Corp. v. Atlantic Coast Line R.R., Fla. Dist. Ct. App., 1967, 196 So. 2d 456, *cert. denied*, Fla., 1967, 201 So. 2d 893, the Florida District Court of Appeal expressly declined to follow *Jacksonville* stating that there were strong indications since *Jacksonville* that Florida Courts would adopt the majority rule. After analyzing *Jacksonville*, the Florida cases, and rejecting it and the idea that a clause reading essentially the same as that in *Jacksonville* was adequate, the *Gulf* Court concluded: "It is evident, then, that Florida decisions hold that an indemnity agreement which indemnifies against the indemnitee's own negligence must state this in 'clear and unequivocal' language."

"* * * there must be language *specifically* designating indemnification against one's own negligence." 196 So. 2d at 459. (Emphasis in original).

This authoritative choice by a Florida Court of Appeal bears the stamp of approval evidenced by the denial of certiorari by the Florida Supreme Court. Unlike the equivocal counterpart in the Federal system, denial of certiorari stands for much in Florida. As we said in Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 5 Cir., 1966, 364 F.2d 957, 965-66, n. 7, quoting Hunter v. Tyner, Fla., 1942, 10 So. 2d 492: "A writ of [certiorari] being simply a method of procedure by which such appeals authorized by the statute can be brought to this Court, its denial, we think, was an adjudication of the propriety of the order involved and it could not again be questioned in this appeal."

We went on, quoting Advertects, Inc. v. Sawyer Indus., Fla., 1953, 64 So. 2d 300: "The order appointing the receiver was reviewed by this Court on a petition for writ of certiorari and

the "majority rule" for Florida because it "rests on an unsound and dangerous foundation" 296 F.2d 256, 262, and because "the majority rule presumes that courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with the plain and clear meaning of the language employed by the contracting parties" and thus constitutes "a dangerous and unwarranted extension of the judicial function" 296 F.2d 256, 262, it recognized that the so-called majority rule had been fairly stated in *Batson-Cook*.[11] We described the process of contract construction in *Batson-Cook* this way. "[I]n this process, it is the law which steps in and tells the parties that while it need not be done in any particular language or form, unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence. The question then is: does the specific contract in dispute clearly reflect such a purpose?" 257 F.2d at 412.[12]

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this Court affirmed the order of the chancellor by denying the petition for writ of certiorari." 364 F.2d at 966.

We are not unmindful of a later Florida Appellate decision purporting to adopt the minority rule, Thomas Awning & Tent Co. v. Toby's Twelfth Cafeteria, Inc., Fla. Dist. Ct. App., 1967, 204 So. 2d 756, where one Judge dissented on the basis of *Gulf, supra*. However, by direct communication with the Clerk of the Florida Supreme Court we are advised that certiorari was not applied for in that case. It is therefore our *Erie* judgment that the majority rule adopted for Florida in *Gulf, supra*, stands as the latest authoritative pronouncement of Florida Law.

[11] Batson-Cook Co. v. Industrial Steel Erectors, 5 Cir., 1958, 257 F.2d 410. American Ag. Chem. Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856 (concurring opinion). This was, of course, an *Erie* declaration for Alabama which may have been superseded by the Alabama Supreme Court in Republic Steel Corp. v. Payne, Ala., 1961, 132 So.2d 581, 586.

[12] In footnote 3 of *Batson-Cook* we were at pains to list the number of cases from this Court echoing this accepted principle and finding now an agreement which did cover the indemnitee's negligence and others holding to the contrary, depending upon the wording, setting, and other guides toward divination of the so-called intent of the parties.

We undertook also, to make quite plain that the contract need not contain the talismanic words "even though caused, occa-

Of course, to state the rule which is a guide to the court's approach hardly determines the case. Indeed, the travail just begins. Except where the words are identical, little is to be gained by comparing this case with that, or matching this phraseology against another. Indeed, the same words frequently receive contradictory constructions at the hands of the highest appellate courts separated only by the imaginary boundary line of contiguous states. The "intention" of the parties is frequently more the statement of a result than a statement of a reason why. So much is wrapped up in the policy considerations which this or that jurisdiction considers within the proper scope of the judicial function or of critical relevance. See *American Ag. Chem. Co.* v. *Tampa Armature Works, supra* (concurring opinion). Added to this is the fact that for every similarity there is a dissimilarity. It begins and ends then as a matter of the law, that is, through the judicial function, construing the contract. That depends on that contract.

When we zero in on this particular contract (see note 2, *supra*) from the standpoint of the position of the parties at the time the contract was made,[13] we find no sign pointing unequivocally to a purpose on the part of a small subcontractor performing some integral part of a Government contract to take upon its shoulders the unlimited obligation either in terms of dollars or events precipitating damage to others when caused primarily

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sioned, or contributed to by the negligence, sole or concurrent of the indemnitee," or like expressions. 257 F.2d at 412.

Although the District of Columbia Circuit accepts the majority rule's requirement that the intention to indemnify against the indemnitee's negligence must clearly appear, Moses-Ecco Co. v. Roscoe-Ajax Corp., D.C. Cir., 1963, 320 F.2d 685, 687 citing *Batson-Cook*, at 688 n.2 it properly declined to follow it if it was read to require the presence of the talismanic words.

[13] When dealing with the construction of a contract, the court must place itself in the place of the parties and determine their mutual intent. J. M. Huber Corp. v. Denman, 5 Cir., 1966, 367 F.2d 104; American Oil Co. v. Hart, 5 Cir., 1966, 356 F.2d 657; American Ag. Chem. Co. v. Tampa Armature Works, Inc., 5 Cir., 1963, 315 F.2d 856. *Cf.* Indemnity Ins. Co. v. DuPont, 5 Cir., 1961, 292 F.2d 569; Fidelity-Phenix Fire Ins. Co. v. Farm Air Service, Inc., 5 Cir., 1958, 255 F.2d 658.

by the active direct negligence of the Government simply because in the judicial scales some slight dereliction of the Contractor occurred which, among joint tort feasors the law would recognize. The very nature of the National Government argues against any but the largest of industrial enterprises as Governmental contractors, rationally undertaking such far-flung burdens. There is first the very size, the immensity, of Government. This is complicated more frequently as a matter of necessity, by security considerations which close to the private contractor any access to information, sometimes of the most rudimentary kind, by which a contractor could ascertain whether it was reasonably safe to rely upon the expectation that the Government would do its part to minimize risks in today's complex, frequently hazardous, Governmental contract operations. Of course, this is not to make the contract in terms here employed superfluous at all. The Contractor bears full responsibility for damage occasioned by his negligence alone or his negligence in connection with other contractors or subcontractors [14] or members of the public, excluding only the Government as indemnitee.[15] It also supplies a procedural device to assure effective legal recourse by the negligence-free Government against the negligent Contractor.[16] The argument sometimes made, that contracts of this kind must be read to include the indemnitee's negligence, for otherwise there would be no occasion to demand hold-harmless indemnity, is extremely superficial. With stakes so high today, parties frequently pay out substantial, huge sums of money in settlement, frequently with the acquiescence

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[14] Cf. Travelers Ins. Co. v. Busy Elec. Co., 5 Cir., 1961, 294 F.2d 139; Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431.

[15] 41 Am.Jur.2d *Indemnity* § 16, at 703 (1968):

> "Where the injury was caused by the concurrent negligence of the indemnitor and the indemnitee, the courts have frequently read into contracts of indemnity exceptions for injuries caused in part by the indemnitee, although there is authority to the contrary."

[16] See, e.g., American Ag. Chem. Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856, 861 n.3 (concurring opinion).

and approval of the indemnitor, reserving questions vis-a-vis themselves for later determination. See, e.g., *James F. O'Neil Co.* v. *United States Fidelity & Guaranty Co.*, 5 Cir., 1967, 381 F.2d 783.

For these reasons the Government fails on its contract construction theory. But the Government, as do all other parties today, when everything else fails, falls back on the Tinker-to-Evers-to-Chance multiple impleaders in the *Sieracki-Ryan-Yaka* situations of indemnity based upon breach of the WWLP—the breach of the warranty or workmanlike performance.[17] So far this court has kept this newly formed concept strictly confined to salt water or at least amphibious applications.[18]

The Government has been found guilty of active negligence proximately causing substantial injuries to the Claimant. Contractor, even though guilty of some concurring negligence, has no obligation under this contract to indemnify the Government against the consequences of the Government's neglect.

AFFIRMED.

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[17] D/S Ove Skou v. Hebert, 5 Cir., 1966, 365 F.2d 341, 1966 A.M.C. 2223; United States Lines v. Williams, 5 Cir., 1966, 365 F.2d 332, 1966 A.M.C. 2418.

[18] See Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431, 436.

The United States urges for the resolution of this case the adoption of the implied-indemnity theory of Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co., 1956, 350 U.S. 124, 78 S.Ct. 232, 100 L.Ed. 133, which allowed indemnity to the shipowner from the stevedore because the stevedore "breached his duty to do the job safely" and his failure to do so gives rise to a cause of action in implied indemnity. This principle of law is indeed Federal in nature, but it is not the appropriate one for the resolution of this case. This Court in Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431, 436, declined to apply Ryan. In fact, this Court held in Koninklyke v. Strachan Shipping Co., 5 Cir., 1962, 301 F.2d 741, that "the express indemnity agreement may have waived any possible implied one." In Centraal Strikstof Verkoopkanter v. Walsh Stevedoring Co., 5 Cir., 1967, 380 F. 2d 523, this Court held that "[t]he implied warranty established in Ryan is a product of the admiralty courts and a creature of the admiralty law * * *. The cases in which the doctrine has been applied have been admiralty cases which presented substantially similar circumstances to those existing in *Ryan*." *Id.* at 529.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1966

No. 23432

D. C. Docket No. 1647—Civil Action

UNITED STATES OF AMERICA, APPELLANT

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY, APPELLEE

Appeal from the United States District Court
for the Southern District of Georgia

Before BROWN, Chief Judge, GOLDBERG and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, United States of America, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 28, 1969

Issued as Mandate: March 26, 1969.

SUPREME COURT OF THE UNITED STATES

No. 395, October Term, 1969

UNITED STATES, PETITIONER

v.

M. O. SECKINGER, JR., ETC.

ORDER ALLOWING CERTIORARI—Filed October 13, 1969

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 368341 312